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A BRIEF SURVEY OF EQUITY JURISDICTION.[1]

III.

IT has been stated on a previous page[2] that, while equity assumes jurisdiction over torts chiefly for the purpose of supplying a remedy by way of prevention, it assumes jurisdiction over contracts chiefly for the purpose of supplying a remedy by way of specific reparation. This latter remedy is, indeed, constantly termed specific performance; but that is in strictness a misnomer. The remedy by way of prevention is the true specific performance; for the object of that remedy is to prevent a violation by the defendant of the plaintiff's right, and, whenever the remedy is successful, that object is completely accomplished. But to prevent a defendant from violating a plaintiff's right is to compel him specifically (*i.e.*, strictly and literally) to perform his duty to the plaintiff. There is, indeed, this difference between the terms "prevention" and "specific performance," namely, that the former is negative, while the latter is affirmative; and hence when equity enforces performance of a negative duty, the remedy is properly called prevention, while, if equity did in truth enforce performance of affirmative duties, the remedy would properly be called specific performance. But, in truth, equity does not attempt to enforce performance of affirmative duties, and therefore it does not attempt to enforce performance of contracts, *i. e.*, affirmative contracts. What is com-

[1] Continued from page 131. The case of Phillips *v.* Homfray, 24 Ch. D. 439, ought to have been cited at page 131, note 1. It was omitted through inadvertence.

[2] *Supra*, page 120.

monly called the specific performance of contracts is the doing of what was agreed to be done, but not at the time when it was agreed to be done; *i.e.*, not till after the time when it was agreed to be done is past, and hence not till the contract is broken. In order to obtain strict performance of a contract, a bill would of course have to be filed before the time for performing the contract arrived; but in fact a bill will not lie (any more than an action at law will lie) upon an affirmative contract until the contract is broken.

What, then, is the reason of this sharp distinction between negative and affirmative duties, namely, that a bill will lie to prevent a breach of the former, while a bill will lie only to enforce a specific reparation of a breach of the latter? First, it is a fundamental principle of procedure that, before any application can be made to a court for relief in respect to a right, the right must be actually violated. This principle is so universal, in all systems of law known to Western civilization, that writers upon jurisprudence assume[1] (if they do not state) that no substantive right, whether absolute or relative, will ever support an action; that every action is founded upon a right resulting from the violation of a substantive right, the law imposing upon every person who violates a substantive right an obligation to indemnify the person injured, and of course vesting in the latter a correlative right to be indemnified for the injury; and hence that the violation of some substantive right is always a *sine qua non* of the maintenance of an action. It follows, therefore, that all remedies by way of preventing the violation of rights are exceptions to an acknowledged rule; and exceptions to an acknowledged rule must never be so extended as to destroy the rule itself.

Secondly, it has already been seen[2] that the violation of negative duties could not be effectively prevented, unless the court could provisionally restrain their violation during the pendency of suits to prevent their violation; *i. e.*, unless the court could provisionally restrain defendants from doing certain acts before the court knows or can know that the acts are such as ought to be restrained. The same thing is equally true of the violation of affirmative duties (though for somewhat different reasons); for an affirmative duty is violated the moment a certain length of time

[1] See Holland, Jurisprudence (3d ed.), ch. 13.

[2] *Supra*, pages 120–121.

elapses, or a certain event happens without its being performed; and, in the great majority of cases, the time for performance would arrive before a decree for performance could possibly be obtained. Could, then, a court of equity restrain the violation of an affirmative duty provisionally and before any trial of the right, as it does in case of a negative duty? Clearly not; for the only way of restraining the violation of an affirmative duty is by compelling performance of it; and hence any restraint of the violation of an affirmative duty is of necessity (not provisional, but) final. To impose such a restraint, therefore (*i. e.*, to compel performance of the duty), before the hearing of the cause, would be to decide the cause, and decide it finally, without any trial, and thus to render a trial entirely futile; for, though a trial should be had, and should result in establishing that no performance was due to the plaintiff, yet the court could not undo what it had done.

It will be seen, therefore, that there is a very broad distinction, in respect to the power of a court of equity to interfere before trial, between affirmative and negative duties, — between restraining a defendant from acting, and compelling him to act. And yet this distinction has sometimes been lost sight of. For example, where a court of equity is called upon to compel a defendant to undo a tort which he has already committed, *i. e.*, to make specific reparation for a tort, what is required of the defendant is the performance of an affirmative duty; and therefore the court cannot properly interfere until the cause is heard, and a decree made in the plaintiff's favor. And yet courts (misled perhaps by the fact that the subject of the suit was a tort) have sometimes compelled defendants to act in such cases by order, made upon motion and before the hearing of the cause, — not indeed directly, but indirectly, *i. e.*, not by commanding them to undo the tort, but by commanding them not to omit undoing it, as if the distinction between affirmative and negative were merely a distinction of words.[1] It is idle to attempt to support such orders by calling them mandatory injunctions, for the reason why an injunction can be granted before the hearing is that it is prohibitory, — not mandatory.

There is another reason why it is not practicable for a court of equity to enforce strict performance of an affirmative contract, namely, that there is but one day when such performance is possible, *i. e.*, the day when performance becomes due; and while it is

[1] See cases cited *supra*, page 129, note 2.

frequently possible for equity to compel a defendant to do an act against his will, it is quite out of its power to compel him to do it on a particular day previously appointed.

Finally, it has already been seen[1] that equity will not entertain a bill to prevent a breach even of a negative duty, unless it appear that a breach is actually contemplated by the defendant; and, as a breach of an affirmative duty consists merely of inaction, it is comparatively seldom that an intention to commit a breach of an affirmative duty can be proved.

Upon the whole, therefore, equity never attempts to compel strict performance of affirmative contracts, but contents itself with compelling reparation for breaches of them. This reparation, as we have seen, equity makes specific, so far as possible; namely, by compelling the thing to be done which was agreed to be done, though the time when it was agreed to be done is past. Such a reparation will, however, presumptively be incomplete, for the plaintiff will have been kept out of his right from the time when performance was due to the time when it is actually obtained; and he will therefore be entitled to compensation for that injury. The measure of such compensation, in case of unilateral contracts, will generally be the actual value of the use and enjoyment of the thing due to the plaintiff during the time that he has been deprived of its use and enjoyment. In case of most bilateral contracts, as the plaintiff is not required to perform until the defendant performs, the measure of the plaintiff's compensation will generally be only the difference, if any, between the benefit that he has derived from the delay in performing his own side of the contract, and the injury that he has suffered from the defendant's delay in performing his side of the contract. In an action at law this compensation would be given by a jury in the shape of damages; and, as a judge in equity cannot perform the function of a jury in assessing damages, cases may arise in which the plaintiff's compensation for delay in performing the contract will have to be assessed by a jury.[2] In most cases, however, equity will be able to ascertain the compensation to which the plaintiff is

[1] *Supra*, page 127.

[2] For example, when it is held that the plaintiff is entitled to special damages for the defendant's delay in performing the contract. For an instance of this, see Cory *v.* Thames Iron Works and Ship-building Co., 11 W. R. 589, L. R. 3 Q. B. 181. In Jaques *v.* Millar, 6 Ch. D. 153, special damages, to which the plaintiff was held to be entitled, were assessed by the judge in equity; but this was done under the authority of a statute.

entitled by its own method, namely, by computation and account. For example, in the common case of a contract for the purchase and sale of land, the proper compensation for delay in paying the purchase-money is legal interest on the purchase-money, while the proper compensation for delay in conveying the land is the rents and profits of the land. Accordingly, in a suit by a vendee, if the rents and profits of the land exceed the interest on the purchase-money, the vendee will recover the difference. So, in a suit by the vendor, if the interest on the purchase-money exceed the rents and profits of the land, the vendor will recover the difference. This mode of ascertaining the compensation to which a plaintiff is entitled seems not to require any special justification, as it seems that a jury ought, in most cases, to act upon the same principles in assessing a plaintiff's compensation by way of damages. In fact, however, equity acts upon a very clear principle of its own, namely, that what ought to have been done shall be considered as having been done. For example, in case of a contract for the purchase and sale of land, if the purchase be completed under the decree of a court of equity, the rights of the parties will be regarded as the same in equity that they would have been at law, if the purchase had been completed pursuant to the contract; or, in other words, the completion of the purchase will be held in equity to relate back to the time when by the contract it ought to have been completed. But if the purchase had been completed at the time stipulated for in the contract, the vendee would have had the use and enjoyment of the land, and the vendor would have had the use and enjoyment of the purchase-money from that time; and hence it follows that the vendor, having had the use and enjoyment of the land when the vendee ought to have had it, must account to the vendee, and the vendee, having had the use and enjoyment of the purchase-money when the vendor ought to have had it, must account to the vendor.

It has been assumed hitherto that the plaintiff alone can recover a compensation for delay in performing the contract; and yet a mutual accounting, on the principles before stated, may result in a balance in favor of the defendant. Shall the defendant in that event recover the balance in his favor? It may be objected, first, that a decree cannot be rendered in favor of a defendant as such, and that, if a defendant would have a decree in his favor, he must file a cross-bill; secondly, that, even if a defendant should file a

cross-bill, he never could be entitled to a decree in his favor, as he stands before the court in the light simply of a wrong-doer, and therefore is not in a condition to set up any claim in his own favor. Neither of these objections, however, is valid. First, in a suit for the specific performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, there is, as will be seen presently, no difference between the plaintiff and the defendant *as such*, *i. e.*, they are both plaintiffs and both defendants, and any decree which is made is in favor of both and against both. Secondly, in such a suit it does not follow, as will be seen hereafter, that the defendant — still less that the defendant alone — has broken the contract. The contract may have been broken by both parties, or it may have been broken by the plaintiff alone. Whenever, therefore, any distinction is to be made between the parties to such a suit, it must be, not between the plaintiff and defendant as such, but between the one who has broken the contract and the one who has not. In most cases, however, no distinction should be made between the parties, so far as regards the mutual accounting, but the vendee should be charged with legal interest on the purchase-money, and the vendor with the rents and profits of the land, as before stated. If, however, a vendee have his money ready at the day fixed for the performance of the contract, and the performance be delayed through the default of the vendor, and the vendee keep himself in constant readiness to perform by letting his money lie idle, he will not be required to pay interest. In such a case, however, the vendee ought to notify the vendor that the money is lying idle; and it would be prudent for him to deposit the money in a bank to a separate account, and to notify the vendor that he had done so. So if a vendor be ready at the day to perform on his part, and the performance be delayed through the default of the vendee, the vendor will seldom, if ever, be liable beyond the rents and profits actually received by him; but if performance be delayed through the default of the vendor, he will be liable for such rents and profits as he might with reasonable diligence have received; and if the property have been injured, or have deteriorated in value, through his fault, he will be required to compensate the vendee in damages for the injury or deterioration in value; and these damages will frequently have to be assessed by a jury.[1]

[1] See Cory *v.* Thames Iron Works and Ship-building Co., *supra*.

When equity enforces specific reparation for the breach of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, it encounters a difficulty of procedure which is unknown to courts of common law; for, as by the contract neither party is bound to trust the other, but each may insist that both shall perform at the same moment of time, and as equity enforces performance of the contract in every point except that of time, it follows that equity cannot enforce performance by the defendant unless the plaintiff also performs concurrently. If this were all, there would be no serious difficulty, so far as regards procedure; for then it would only be necessary for the court by its decree to appoint a time and place for performance by the defendant, and to direct him to perform, provided the plaintiff also performed. That, however, would be unjust to the defendant; for it would impose upon him the burden of making all the necessary preparations, and holding himself in readiness for performing his part of the contract, and yet leave him in a state of complete uncertainty, up to the last moment, as to whether the plaintiff would perform his part. Accordingly, equity says the plaintiff shall not be permitted to blow hot and cold, but that, having elected to have the terms of the contract carried out, notwithstanding the time stipulated for is past, he shall be bound by his election, and shall therefore be compelled to perform on his part. But how can performance be enforced against a plaintiff, against whom no complaint is made, nor any relief asked, and who would not be before the court at all, had he not come before it voluntarily, seeking relief against the defendant? The difficulty might perhaps be met by the defendant's filing a cross-bill, praying that, if he be compelled to perform, the plaintiff also be compelled to perform concurrently with the defendant. But clearly the defendant is not bound to file a cross-bill; he does not wish to have the contract performed, and he is not bound to assist the plaintiff in his endeavors to compel the performance of it; nor will the defendant's refusal to file a cross-bill justify the court in making a decree against the defendant which, but for such refusal, would be unjust. However, courts of equity have succeeded in surmounting this difficulty without any stretching of their powers, and without doing any injustice to either party; for they make it a condition of giving relief to the plaintiff that he shall submit to have a decree made against himself also, and indeed they treat a plaintiff as so

submitting by implication. Accordingly, whenever a decree is made for the performance of a bilateral contract, the two sides of which constitute mutual and concurrent conditions, the court will, if necessary, appoint a time and place for performance, and will require both parties to perform at such time and place concurrently; and, if either of them refuses or neglects so to perform, he will be punished for contempt on the application of the other.

Having thus seen how equity exercises jurisdiction over affirmative contracts (and what is true in this respect of affirmative contracts is equally true of all affirmative obligations, whether created by contract or not), we are prepared to inquire over what affirmative contracts or obligations equity will assume jurisdiction. And here it must be borne in mind that we are now dealing only with the legal rights created by contracts and other obligations. When contracts or other obligations are the means of creating equitable rights, such rights can, of course, be enforced by equity alone; and hence equity assumes jurisdiction over such rights as of course. In what cases, then, will equity assume jurisdiction over the legal rights created by affirmative contracts and other affirmative obligations? In all cases in which these two questions can be answered in the affirmative, namely: First, will a compensation in money be an inadequate remedy for a breach of the contract or other obligation? Secondly, can equity enforce a specific reparation of the breach? It will be convenient to consider the second of these questions first; for the first question will arise only in those cases in which the second can be answered in the affirmative. The second question can be easily answered with sufficient accuracy for most purposes. If a contract consists in giving (*dando*), equity can enforce a specific reparation for a breach of it; if it consists in doing (*faciendo*), it cannot.[1] Accordingly, equity will assume jurisdiction, *e. g.*, over all contracts for buying

[1] Of course it is not meant that it is impossible for equity to enforce any contract which consists in doing; but only that the enforcement of such contracts in equity is likely to involve so much difficulty that equity will not attempt to enforce them. To this rule there are, however, exceptions. For example, in England if a railway company purchase land over which to construct its line, and agree, as a part of the consideration for the sale, to construct certain works on the land purchased, either with a view to rendering the railway less injurious to the vendor, or with a view to affording facilities to the vendor for using the railway, equity will compel the railway company to construct the works. Lytton *v.* The Great Northern Railway Co., 2 Kay & J. 394; Storer *v.* The Great Western Railway Co., 2 Y. & Coll. C. C. 48. This exception is supported by very strong reasons: first, the railway company is paid in advance for constructing the works; secondly, the vendor

and selling and for exchanging one thing for another, if a compensation in money be an inadequate remedy for a breach of them; but it will not assume jurisdiction, *e.g.*, over contracts for services or building contracts. In what cases, then, will equity deem a compensation in money an inadequate remedy for the breach of a contract which consists in giving? Here again a distinction must be taken between those contracts which consist in giving something which is specified and identified by the contract, and those which consist in giving something of the kind, quality, or description specified in the contract. In cases belonging to the second class, it seems that a compensation in money will always be an adequate remedy for a breach of the contract; for the thing contracted for cannot be worth more to any one than the sum of money for which it can be purchased in the market, and that sum will be the measure of the compensation which a jury will give for a breach of the contract. It cannot, therefore, be very material to the person who has contracted for the thing whether he receive the thing itself or a sum of money with which he can purchase the thing.[1] In cases belonging to the first class, on the other hand, there is but one thing in existence which will satisfy the contract. If, therefore, that one thing has a value in the eyes of the person who contracted for it, which cannot be measured by money, or a greater money value than it can properly have in the eyes of a jury, it is clear that a compensation in money will not be an adequate substitute

cannot construct the works himself; thirdly, an English railway company is more amenable to the authority of a court of equity than is an ordinary private individual.

Another exception (founded however upon very different reasons) is where an informal agreement is made to enter into a formal contract. Although the informal agreement, in such a case, consists in doing, yet it is as easily enforced as any contract which consists in giving; for all that the defendant is required to do is to sign (or sign and seal) and deliver the formal contract, when the latter has been drawn up (under the direction of a Master, if necessary) in conformity with the informal agreement. Whenever, therefore, damages will not be an adequate remedy for a breach of the informal agreement, equity will compel an execution of the formal contract. Accordingly, an informal agreement to insure (*i.e.*, to issue a policy of insurance) will be enforced in equity; for, if the insured should bring an action at law, he would recover only nominal damages It is possible, indeed, that the insured might recover for a loss in an action at law without a policy; but, even if he could, the loss would constitute a separate and distinct cause of action, and would not affect the right of the insured to have a policy.

[1] The English courts have, however, made one extraordinary exception to the rule that such contracts will not be enforced in equity, namely, in the case of contracts for the purchase and sale of shares in companies. This exception was first established by the case of Duncuft *v.* Albrecht, 12 Sim. 189. That case has not generally been followed, however, in this country.

for the thing itself. But here an important question arises, namely, whether the jurisdiction of equity will depend upon the nature of the thing contracted for, or upon the views and intentions of the person who contracts for it in the particular case. If it depends upon the former, it is a question of law, and it should be the subject of settled rules; if it depends upon the latter, it is a question of fact, and hence the fact must be tried as often as the question arises. Unfortunately, the question cannot be answered unqualifiedly either way; but, for the most part, the jurisdiction of equity undoubtedly depends upon the nature of the thing contracted for. To make it depend upon the actual views and intentions of one of the contracting parties would be subject to two very serious objections: first, that the decision of the question of jurisdiction would involve a ruinous expense both to the parties and to the public; secondly, it would involve an inquiry which a court of justice can seldom enter upon with much chance of getting at the truth, and which, therefore, it should never enter upon except from necessity. Upon the whole, it may be said that the jurisdiction will depend exclusively upon the nature of the thing contracted for, wherever the court can see its way to laying down an absolute rule; but where it cannot, it would be too much to say that all evidence as to the views and intentions with which the thing was contracted for in the particular case will be excluded.

In what cases, then, will equity assume jurisdiction over a contract which consists in giving a specified thing on account of the nature of the thing? It will do so, first, whenever the thing is land, or any interest in land, or any incorporeal thing material to the enjoyment of land; secondly, whenever the thing is a vessel, or any interest in a vessel;[1] thirdly, whenever the thing is a chattel for which no substitute can be obtained, or for which a substitute can be obtained only with great difficulty. It must be confessed that this last rule is somewhat vague; but we must choose between a vague rule and no rule at all. Unfortunately, also, there are but few precedents by which the application of this rule can be illustrated. One reason of this will doubtless be found in the peculiar rule of our law respecting the sale of chattels (other than vessels); namely, that the moment that a contract is made for the sale of a chattel, the title to the chattel passes from the seller

[1] Hart *v.* Herwig, L. R. 8 Ch. 860. The statement in the text assumes that the jurisdiction of equity is not interfered with by registry acts. See *infra*, page 377, note 2.

to the purchaser. In consequence of this rule, the right of a purchaser of a specific chattel is commonly a right of property from the beginning,—not a right resting upon contract. There is, however, a rule of equity jurisdiction, which is so strictly analogous to the one under consideration, that the precedents which illustrate the application of the former will illustrate the application of the latter also, namely, the rule that a bill in equity will lie to recover the possession of a chattel wherever a compensation in money would be an inadequate remedy. That rule will be considered hereafter.

It is obvious that contracts which consist in giving specified things are almost invariably bilateral; and yet it is commonly only one of the parties to the contract who is to give a specified thing; and even if a specified thing is to be given by each party, yet the thing to be given by one may be of such a nature as to give a court of equity jurisdiction over the contract, while the thing to be given by the other is not. How, then, is the question of equity jurisdiction to be dealt with in case of a bilateral contract, one side of which is of such a nature as to give a court of equity jurisdiction over the contract, but the other is not? It must first be ascertained whether the two sides of the contract are or are not mutually dependent upon each other. If they are not, they are to be regarded, for the purposes of the question now under consideration, as two separate unilateral contracts; for in such a case the two sides of the contract can never be the subject of any one suit (unless, indeed, a suit and a cross-suit be regarded as one suit), and therefore the question whether equity has jurisdiction over one side of the contract is always independent of the question whether it has jurisdiction over the other side of the contract. It is upon this ground that the decision rests in the important case of Jones *v.* Newhall;[1] for, though performance by the plaintiff was there dependent upon performance by the defendant, yet the converse was not true; on the contrary, performance by the defendant was a condition precedent to performance by the plaintiff. Consequently, though the defendant, on paying or tendering the purchase-money, could have maintained a bill in equity for a conveyance of the land, yet the plaintiff could not maintain a bill to recover the purchase-money, his remedy at law being perfectly adequate; nor could he, it seems, even though performance

[1] 115 Mass. 244.

by him had been a condition precedent to performance by the defendant; for though he could not in that case have recovered the purchase-money at law until he had conveyed the land, even though he were prevented from conveying the land by the defendant's refusing to accept it, and could only recover special damages for the breach of the contract by the defendant by which he was prevented from conveying the land, yet it seems that special damages are always an adequate remedy for a breach of contract by a vendee which prevents performance by the vendor.

When, however, the two sides of a bilateral contract are mutually dependent upon each other, as they almost invariably are in contracts for the sale of property, equity cannot, as we have seen, enforce performance of one side of the contract, unless it enforces performance of the other side also. Therefore, if one side of such a contract be of such a nature that equity cannot enforce it, then it cannot enforce the other side either. If, therefore, A and B agree that A shall serve B for one year, and that B shall convey to A a certain piece of land, and B break the contract by refusing to permit A to serve him, yet A can have no relief in equity, as equity cannot compel performance by A. It is true that, in this case, the two sides of the contract happen not to be *mutually* dependent, because performance by A is a condition precedent to performance by B; and if A could perform his side of the contract without the coöperation of B (*i. e.*, if B could not prevent performance by A), equity would enforce performance by B at the suit of A (A having first performed on his part), though it could not compel performance by A at the suit of B. But, as B can prevent performance by A (*i. e.*, as A cannot perform without B's coöperation), the case is the same in respect to equity jurisdiction, as if the two sides of the contract were mutually dependent upon each other. On the other hand, if both sides of the contract be of such a nature that equity *can* enforce them, and one side be of such a nature that equity *ought* to enforce it, then equity will enforce both sides, though the other side consist merely, *e. g.*, in the payment of money; and this equity will do, not only at the suit of the party who is entitled to come into equity from the nature of the thing for which he has contracted, but at the suit of the other party as well. Accordingly, it has never been doubted that a vendor of land has as much right to enforce performance of the contract in equity as the vendee. This right of the vendor cannot, indeed, be demon-

strated. Equity might have refused to assume jurisdiction, except at the suit of the vendee, without committing any absurdity, and perhaps without doing any clear injustice to the vendor. Courts of equity have preferred, however, in this as in other cases, to adhere to their favorite maxim that equality is equity.

Having thus seen in what cases equity will assume jurisdiction over contracts, it remains to inquire under what circumstances equity will give relief to a plaintiff who sues upon a contract. As such a plaintiff founds his suit upon a legal right, the circumstances under which he is entitled to recover are generally the same in equity as at law, but not always. It is always in the discretion of a judge in equity whether he will aid a legal right; and hence he may refuse relief to a plaintiff who sues upon a contract, though the plaintiff's right to recover at law be conceded, and though equity confessedly have jurisdiction of the case. It follows, therefore, that more may be required of a plaintiff who sues in equity upon a contract than would be required of him at law; and more is required in fact. First, it is not sufficient in equity that a contract be under seal, nor even that it be supported by a sufficient common-law consideration; it must also be supported by a consideration which equity regards as sufficient. Generally a consideration which is sufficient at law will be sufficient in equity also, but not always. For example, one dollar is a sufficient consideration at law to support a promise to convey the largest estate; but equity would not enforce performance of such a promise, even though it were under seal. So a consideration which is sufficient in equity will generally be sufficient at law also, but not always. For example, a desire to reconcile a father to the marriage of his son will be a sufficient consideration in equity for a promise to convey an estate to the son, though it is no consideration at law.[1] If, therefore, such a promise be under seal, equity will enforce it; but if it be not under seal, equity will not enforce it, because it is not valid at law. In short, as by the civil law an agreement must have a "cause" (*causa*) in order to create an obligation,[2] so in equity it must have a "cause" in order to be enforced in equity; and this "cause" is not precisely the same thing as our "consideration."

Secondly, equity will not enforce a contract if its enforcement

[1] Wiseman *v.* Roper, 1 Ch. Rep. 84.

[2] See Pothier, Traité des Obligations, §§ 42–46.

will not be conducive to justice. If it appear, therefore, that the plaintiff has overreached the defendant, or has taken advantage of his ignorance or inexperience, or has driven a "hard bargain" with him,— in short, if it appear that he has not exercised entire good faith towards the defendant in obtaining the contract, though he have been guilty of no such fraud as would prevent his recovering at law, yet equity will leave him to such damages as a jury will give him.

Thirdly, equity considers it as unjust for a defendant to be kept in uncertainty and suspense as to whether he will be required to perform the contract or not; as to whether, *e. g.*, he is to keep his estate or convey it to the plaintiff. In particular, equity considers it as unjust for the plaintiff to speculate at the defendant's expense,— to sue at law or in equity, according as events happening after the breach of the contract render specific performance or damages most for his interest. If, therefore, there is satisfactory evidence that a plaintiff is seeking specific performance only because of events which have happened since the contract was broken, the bill will be dismissed. And, even in the absence of any such evidence, a plaintiff's bill will be dismissed, on the ground of laches, unless it was filed promptly, and has been prosecuted with diligence.[1] The amount of delay which will constitute laches cannot, indeed, be precisely defined, as it varies according to circumstances; but the only safe course for a plaintiff who desires specific performance is to use as much diligence as is reasonably practicable.

The power of a court of equity to enforce specific performance is of course limited by the defendant's ability to perform; nor can a defendant be imprisoned for not performing a decree which he is unable to perform, as he is guilty of no contempt. If, therefore, the coöperation of a third person be necessary to the performance of a contract, it is a sufficient excuse for the defendant that such third person refuses to coöperate, even though the defendant expressly bound himself to procure his coöperation; and this rule holds, even though the third person be the defendant's wife. Mere poverty, however, is not an inability which any court can recognize; and therefore inability is never an excuse for not performing a decree for the payment of money.

[1] If, however, a vendee of land be in possession of the land *under the contract*, the rule stated in the text will not apply. Mills *v.* Haywood, 6 Ch. D. 196, 202.

An inability in a vendor to make a good title is a legal (not a physical) inability to perform the contract; and therefore it is no excuse in the mouth of the vendor for not doing all the physical acts necessary for the performance of the contract. It is an excuse, however, in the mouth of the vendee for not performing the contract on his part. Moreover, the court takes upon itself the burden of ascertaining whether the vendor has such a title as the vendee is bound to accept; and that, too, whether the vendor or the vendee be plaintiff in the suit. Thus, if the vendor be plaintiff, he is not required either to allege or to prove that his title is good, nor is the vendee required to allege or prove the contrary; but the pleadings and proofs assume that the plaintiff is able to make a good title; and, if the questions raised by the pleadings and proofs be decided in the plaintiff's favor, a decree is made that the contract be specifically performed, provided the plaintiff be able to make a good title, and that the cause be referred to a Master to ascertain and report whether a good title can be made. So, though the vendee be the one who seeks specific performance, he is not regarded as submitting to perform on his part, except upon condition that he can have a good title; and, therefore, if a decree be made in his favor, it must be in the same form as when the vendor is plaintiff, unless the vendee declare himself satisfied with the vendor's title, and waive any reference to a Master in regard to it. The result is, therefore, that a reference as to title is an incident to every specific performance in equity of a contract for the purchase and sale of land, unless such reference be waived by the vendee.

If a vendor be able to make a good title to a part of the land sold, but not to the remainder, the vendee will be entitled, at his option, to a specific performance as to the former, and to have the relative value of the latter deducted from the purchase-money. So if the vendor's title be defective as to the whole of the land, and the vendee elect notwithstanding to have the contract performed, the latter will be entitled to have a deduction made from the purchase-money on account of the defect of title, provided the amount to be deducted can be ascertained with reasonable accuracy. Thus, if the land be merely subject to a pecuniary encumbrance (*e. g.*, an ordinary mortgage), the vendee will be entitled to have the amount of the encumbrance deducted from the purchase-money, he indemnifying the vendor against the encumbrance. So

if a vendor, who has contracted to convey the fee-simple, have only an estate for life or lives, or for years, the amount which ought to be deducted from the purchase-money, on account of the defect of title, can be ascertained without difficulty. But where the defect in the vendor's title is of such a nature that there are no definite data by which to estimate the amount that ought to be deducted from the purchase-money on account of it, the vendee will not be entitled to specific performance, except upon the terms of paying the full amount of the purchase-money.[1]

A vendor may be unable fully to perform his contract in consequence of something that has happened to the property since the making of the contract, as where the subject of sale is land and buildings, and, after the making of the contract, the buildings are destroyed by fire. In such a case the vendee will be entitled, at his option, to have a conveyance of the land, with a deduction from the purchase-money of the relative value of the buildings.

Are there any cases in which a plaintiff, who cannot recover on a contract at law, can nevertheless have a specific performance in equity? To say that there are such cases would seem at first sight to be equivalent to saying that a plaintiff who has no legal right may sometimes recover in equity upon the ground that he has a legal right. The law may, however, refuse to recognize a right, because, if a right were recognized, the law would have no adequate means of enforcing it, or no means of enforcing it without giving the plaintiff more than he would be entitled to, and thus doing injustice to the defendant; and, in such a case, if the reason why the law refuses to recognize the right does not exist in equity, the right may be recognized in equity without any violation of law, though in strictness the right will then be equitable, — not legal. At all events, there is an important class of cases in which equity, rightly or wrongly, gives relief to the party in whom the legal right created by the contract is vested, though, confessedly, such party could not recover in an action at law. The cases referred to are those in which, the contract being bilateral, the covenant or promise of the defendant is subject to the implied condition that the plaintiff's covenant or promise shall be performed either before the defendant's or concurrently with it. If the condition be express, and the plaintiff break his covenant or promise (*i. e.*, break the condition on which the defendant's cove-

[1] See *infra*, page 373.

nant or promise depends) in ever so slight a degree, he can never recover against the defendant, either at law or in equity. The reason is obvious, namely, that by the terms of the contract no performance is due to the plaintiff. And the rule at law is the same, though the condition be implied, so long as no part of the contract has been performed. But if the plaintiff have performed his covenant or promise in part before committing any breach of it, the implied condition is then modified, and only requires the plaintiff to perform his covenant or promise so far as is essential to its main scope and object; and the only effect of a breach by the plaintiff in points not essential will be (not to disable the plaintiff from enforcing the defendant's covenant or promise, but) to enable the defendant to recover damages against the plaintiff for the breach. In equity, on the other hand, a breach by the plaintiff of his own covenant or promise, if it be only in points not essential, will not disable the plaintiff from enforcing the defendant's covenant or promise, even though no part of the plaintiff's covenant or promise have been performed, unless performance by the plaintiff be made by the contract an express condition of performance by the defendant. In justification of this difference between law and equity, it may be said that when a plaintiff, who has broken his own covenant or promise, is permitted to enforce at law the covenant or promise in his favor, no allowance can be made to the defendant for the plaintiff's breach, but the plaintiff will recover as if he had fully performed on his part, and the defendant must indemnify himself by suing the plaintiff in turn. In equity, on the other hand, the compensation in money to which the defendant is entitled for the plaintiff's breach will be ascertained in the plaintiff's suit, and will be deducted from the amount to be paid by the defendant, or added to the amount to be paid by the plaintiff (as the case may be); and this, too (on the principle already explained), without the necessity of the defendant's filing any cross-bill. If this difference in procedure were the only reason why the common law has a different rule from that which prevails in equity, the justification of equity would be complete; but it may be alleged in support of the common-law rule (with what force the writer will not presume to say) that courts are just as much bound by an implied condition as they are by an express condition, unless some event has happened since the making of the contract which introduces a new element into the case.

The rule in equity being, however, as stated above, it often happens that bills for specific performance are filed by parties who have themselves broken the contracts on which they sue; and as often as this is the case the question arises whether the plaintiff's breach goes to the essence or not. In case of an obligation merely to pay money, a breach can never go to the essence, as interest on the money is always, in legal contemplation, full compensation for the breach. Therefore, a purchaser of land can never lose the right to specific performance by a mere breach of the contract, though he may easily lose it by delay or laches. In case of an obligation to give a specified thing, a breach by the plaintiff may consist either in a failure to give the thing on the day when by the contract it is due, or in a failure to give some portion of it at all, or to give it in the condition in which it was agreed to be given. A breach of the first kind is a breach in time merely, and generally such a breach does not go to the essence. For example, it is not presumably of vital importance to the purchaser of an estate whether he get the estate to-day or to-morrow, or even whether he get it this year or next. It is always open, however, to a purchaser to show that he purchased the estate with a particular object in view, which object was known to the seller, and that that object has been defeated by the seller's delay in performing the contract; and then the seller's breach will go to the essence. So time may, it seems, be of the essence of a contract for the purchase and sale of property from the nature of the property, *e.g.*, where the property is constantly diminishing in value, as a life interest, or constantly increasing in value, as a reversionary interest. So if a contract contain an express declaration that time shall be of its essence, such declaration will be binding upon the court; for the only ground upon which a court can hold that any given breach does not go to the essence (or rather, perhaps, that any given breach of an implied condition by the plaintiff does not disable him from enforcing the contract against the defendant) is the intention of the parties, actual or presumed. Such a declaration has, therefore, the same effect as that of making the performance of the contract by each party expressly conditional upon its performance by the other party.

It is often said that time is not of the essence of a contract in equity, as if equity differed from law in that respect; but that is a mistake. Whatever is of the essence of a contract at law is

of its essence in equity also. It would be strange if it were not so, since the question is entirely one of construction, and the construction of a contract ought to be the same in all courts. The real difference between equity and law is the one already adverted to; namely, that at law it is not material whether a breach goes to the essence or not, unless there has been part-performance.

If a breach of an obligation to give a specified thing consist in a failure to give some portion of the thing at all, or to give it in the condition in which it was agreed to be given, there is no presumption that the breach does or does not go to the essence; but it seems that the defendant will always have to satisfy the court that the breach does go to the essence, in order to protect himself against specific performance. The question is always referred to a Master. The most common case is where the plaintiff, a vendor of land, is unable to perform the contract as to part of the land for want of title; and in that case the Master is directed to inquire whether the part of the land to which the plaintiff has no title is "material" to the enjoyment of the residue.

If a vendor of land be unable fully to perform his contract, not because his title fails as to a part of the land, but because there is a flaw in his title which extends to all the land, the breach will always go to the essence, however small the flaw may be, unless, indeed, it be so small as not to be a flaw at all in legal contemplation. In other words, a purchaser of land will never be compelled to accept a defective title, with a compensation in money for the defectiveness of the title. The reason seems to be that it is impossible to measure a flaw in a title by a money standard.[1]

If A and B make an agreement with each other for the purchase and sale of land, and A commit a breach of the agreement by failing to perform at the time agreed upon, B will be entitled at law to rescind the contract; and he will be entitled to rescind it in equity also, unless A have a right to specific performance on the ground that the breach committed by him did not go to the essence. B, therefore, immediately upon his committing a breach, may file a bill to have the contract rescinded; and A can resist a decree for rescission only by obtaining a decree for specific performance; and, in order to obtain such a decree, he should file a cross-bill.

If a contract be made for the purchase and sale of land which

[1] See *supra*, page 370.

has buildings on it, and, after the making of the contract, but before the conveyance of the land, the buildings be casually destroyed by fire, upon whom will the loss fall? At law it will clearly fall upon the vendor in all cases. The buildings belong to the vendor, and *res perit suo domino.* If the loss happen before the time fixed for completing the purchase has arrived, the vendor will be unable to perform the contract on his part, and, therefore, he can never enforce it against the vendee. The vendee will not, indeed, be able to enforce the contract against the vendor either, because the act of God will excuse the latter from performing his contract *qua* contract, though it cannot relieve him from the consequences of failing to perform it *qua* condition. The contract, therefore, will never be performed, nor will any liability be incurred for not performing it. Each of the parties to the contract will, therefore, be in the same situation as if the contract had never been made. If, on the other hand, the loss happen after the time fixed for completing the purchase is past, it will equally follow that the contract will never be performed, for it will have been broken by either the vendor or the vendee, or by both. If broken by the vendor, his liability in damages will not be reduced by the loss; if broken by the vendee, the vendor's right to damages will not be enlarged by the loss; if broken by both parties, of course neither will be able to recover against the other, and it will be as if the contract had never been made, or as if it had been rescinded by mutual consent.

What is the rule in equity in such a case? Clearly it ought to be the same as at law, if the loss happen before the time fixed for completing the purchase has arrived; for in that case the consequences of the loss will be the same in equity as at law, namely, that the vendor will be unable to perform the contract on his part. It is true that equity may enforce the contract against the vendee, notwithstanding the destruction of the buildings; but if it does, it must do so because the breach of condition by the vendor did not go to the essence of the contract, and hence the performance by the vendee must be with compensation for the loss of the buildings, *i. e.*, the value of the buildings must be deducted from the purchase-money to be paid by the vendee. If, on the other hand, the fire happen after the time fixed for completing the purchase is past, the loss will in equity fall upon the vendee; *i.e.*, the vendor will be able to throw the loss upon the vendee by enforcing

specific performance of the contract in equity, assuming, of course, that he is in a condition to enforce such performance. The reason of this is that, when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened.

Such is the rule which ought to prevail in equity, and which formerly did prevail;[1] but, since the time of Lord Eldon, English courts of equity have drifted into great confusion upon this subject, for they now hold[2] that a loss by fire which happens any time

[1] "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not, in equity, be bound to pay for the house." *Per* Sir Joseph Jekyll, M. R., in Stent *v.* Bailis, 2 P. Wms. 217, 220. The same rule was acted upon by Lord Eldon in Paine *v.* Meller, 6 Ves. 349. It is true that the purchase there was to be completed on the 29th of September, while the fire did not happen till the 18th of December following; but the time for completing the purchase had been extended by the mutual consent of the parties; and Lord Eldon held that the vendee must bear the loss, provided he had been put in default by the vendor before the loss happened, but not otherwise.

[2] Poole *v.* Adams, 12 W. R. 683; Rayner *v.* Preston, 14 Ch. D. 297, 18 Ch. D. 1. In the first of these cases, Kindersley, V. C., seems to have supposed that he was following the common-law rule; for he said it was "clear that the contract remained good at law [*i. e.*, notwithstanding a loss by fire before the time for performing the contract arrived], and that the purchaser might have been sued for breach, in refusing to complete and pay his purchase-money." It seems impossible to reconcile either of the two cases just cited with that of Counter *v.* Macpherson, 5 Moo. P. C. 83. In the latter case, there was an agreement for a lease of land and buildings by the plaintiff to the defendants. Before the lease was made, the buildings were partly destroyed by fire. The fire happened after the day fixed for performing the agreement, *i. e.*, for making the lease, but the time had been extended by mutual consent (as in Paine *v.* Meller, *supra*), and at the time of the fire there had been no breach of the contract by either party; and the court held that the plaintiff was entitled to specific performance only upon the terms of restoring the buildings to the condition in which they were before the fire, and in other respects performing the contract on his part. Hence it was held that the loss fell upon the plaintiff as well in equity, as at law; and the court declared that upon such a question equity had no rule of its own, but followed the law. It is true that the defendant's obligation to perform was conditional on performance by the plaintiff, but so it was in all the cases in which this question has arisen. In all of them alike, too, the condition was implied,—not express. This was emphatically the case in Counter *v.* Macpherson, as there was there no formal writing whatever, the agreement having been made out entirely by letters written by the parties respectively to each other.

It is also true that the agreement in Counter *v.* Macpherson contained a condition precedent, to be performed by the plaintiff; but, in respect to the question under consideration, there is no difference between a condition precedent and a concurrent condition. Moreover, every vendor of land has a condition precedent to perform, according to the English practice, namely, that of showing a good title.

Finally, it is true that one of the conditions to be performed by the plaintiff in Counter

after the *making* of the contract falls upon the vendee, thus holding in effect that the performance of a contract enforced in equity relates back to the time of making the contract. Such a doctrine appears sufficiently extraordinary without adverting to its consequences. When an act done at one time relates to a different time, the relation is, of course, a legal fiction; and the only justification for the adoption of a legal fiction is that thereby more perfect justice can be done. In regard to the performance of a contract, the perfection of justice consists in its being performed at the time fixed in the contract for its performance; and therefore the reason is obvious why a performance enforced in equity should relate to that time; but what possible reason can exist for making such a performance relate to the time of making the contract, *i. e.*, to a time when neither party was bound either to perform or to accept performance? Such a relation is, in its consequences, much worse than no relation at all; for the worst consequence of the latter would be that the law would not succeed in doing perfect justice, while the consequence of the former may be that the law will inflict the greatest injustice. For example, what greater injustice could be inflicted than by shifting the consequences of an act of God from A, upon whom it has fallen, to B, upon whom it did not fall,—who was confessedly in no way responsible for the act, and who has done no wrong whatever to A, whether by committing a tort or by breaking an obligation? Moreover, the English courts do not carry out their doctrine to all its legitimate consequences. For example, to be consistent, they ought to require a vendor to account to the vendee for the rents and profits of the land from the time of making the contract, and they ought to require the vendee to pay interest on the purchase-money from the same time; and yet the time from which they actually require both is

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v. Macpherson was of a kind not often found except in agreements for leases, namely, the repairing of the existing buildings and the erection of a new building; but that introduced no new element into the case. Had there not been such a condition, there would have been another, namely, that of leasing the property in the condition that it was in at the date of the agreement; and the effect of damage by fire upon each of these conditions is the same, namely, that of making it impossible for the owner to perform the condition without repairing the damage caused by the fire.

Upon the whole, there appears to have been but one material distinction (though that was a decisive one) between Counter *v.* Macpherson and Paine *v.* Meller; namely, that in the latter the plaintiff had apparently performed upon his part, and the defendant was in default, while in the former the plaintiff had not fully performed on his part, and so, of course, the defendant was not in default.

the time fixed for the performance of the contract. It is not difficult to understand why they have not gone wrong upon these latter points. To require a vendee to pay interest on the purchase-money before the principal is due, would be too palpable a disregard of the terms of the contract; and of course it would not do to require the vendor to account for the rents and profits of the land, unless he is to receive interest on the purchase-money. Moreover, the computing of interest on purchase-money and the taking of accounts of rents and profits of lands are matters of daily experience in cases of specific performance, as to which the practice has never changed, and as to which the established forms of decrees have prevented the courts from going astray. But what has blinded the courts to the obvious fact that, in cases of specific performance, the time from which interest is to be computed, and the rents and profits accounted for, is the time to which the performance relates?[1] One answer to this question may be found in the notion which has extensively prevailed, that a contract to convey land is in equity an actual conveyance; that there is in equity no difference between an actual conveyance and a contract to convey.[2]

[1] "If in equity these premises belonged to the vendee, he would have a title to the rents and profits at Michaelmas by relation; and he must pay the purchase-money with interest from that time." *Per* Lord Eldon, in Paine *v.* Meller, 6 Ves. 349, 352.

[2] The obstinacy of this error is strikingly illustrated by the case of Hughes *v.* Morris, 2 De G. M. & G. 349, where it was decided that a purchaser of shares in a British vessel could not have specific performance of the agreement for the purchase and sale, because such agreement did not conform to the requirements of the Registry Act respecting the actual transfers of vessels, the court holding that specific performance would make the purchaser a part-owner of the vessel in equity from the date of the agreement, and thus violate the provisions of the statute. Knight-Bruce, L.J., said (p. 355): "What the legislature had in view was not merely the passing or not passing of what we call the legal estate, but that whenever property in a vessel should be changed, it should be changed in a particular way. Now, whether there is a sale, or a contract for a sale, can make no difference. A contract for a sale is, in the view of a court of equity, a sale; whether an actual transfer is made is of no consequence, if a transfer is agreed to be made, because that which is agreed to be done is, in the view of a court of equity, *for many purposes*, held to be done." Lord Cranworth, L.J., also said (p. 358): "The provision of the act being that a transfer shall not be valid for any purpose whatsoever, the argument is that a contract, although not valid to transfer the property, may make a party to it the owner in equity. That would be to get rid of the whole policy of the statute, namely, that there should be the means of tracing from the original grand bill of sale the ownership for all time. But if the doctrine be right that is contended for, this need not appear in any document from the very first sale." It will be seen, therefore, that the view of the court was that to allow specific performance of agreements for the purchase and sale of British vessels would be to enable owners of such vessels to nullify the Registry Act by separating the beneficial from the legal ownership, just as owners of land formerly nullified the

But how did such a notion ever become prevalent? It derives no countenance from anything that is actually done in suits for specific performance; and yet it is only in suits for specific performance that it can ever be maintained that the ownership of land has been changed in equity by a mere agreement to change it. Perhaps the notion originated partly in a mere misunderstanding of the rule that a performance of a contract enforced in equity relates back to the time when it ought to have been performed; for it has been common to express that rule by saying that whatever is agreed to be done is considered by equity as done. It is believed, however, that the notion had its chief source in the doctrine of equitable conversion, *i.e.*, in the doctrine that land will sometimes be regarded by equity as converted into money and money into land, though no conversion have in truth taken place. This doctrine has been adopted for the purpose of giving effect to the intentions of the owners of property in regard to the destination of their property after their deaths. Thus, if a testator by his will direct a certain piece of land to be sold after his death,

law relating to the legal ownership of land by separating the use of the land from the land itself. And if it be true that an agreement to convey is, in equity, an actual conveyance, the view of the court was right. It is certain, however, that a mere agreement to convey is very far from being, in equity, an actual conveyance. It is only by specific performance that equity ever converts an agreement to convey into an actual conveyance. By specific performance, however, equity converts an agreement to convey into an actual conveyance at law as well as in equity. How, then, can specific performance impart to an agreement to convey any further effect or operation in equity than it has at law? Only by making the performance of it relate back. Even, therefore, if equity made every performance (whether compulsory or voluntary) of an agreement to convey relate back to the date of the agreement, it would by no means follow that an agreement to convey would, in equity, be an actual conveyance. The operation of such an agreement in equity would still be wholly dependent upon its operation at law, *i.e.*, it could never operate in equity unless and until it operated at law. Since, then, it is only such conveyances as are actually enforced in equity that relate back, and since, of all the conveyances that are made (even of land), not one in a million is enforced in equity, the statement that an agreement to convey is in equity an actual conveyance seems extraordinary.

If it be said that the actual decision in Hughes *v.* Morris does not involve the proposition that an agreement to convey is in equity an actual conveyance, and that the decision may be supported upon the ground that the agreement there in question, if it had been enforced, would have become by relation a conveyance in equity from the date of the agreement, or at least from the time fixed for the performance of the agreement, and would thus have violated the statute, the answer is, that such a relation, as it is a mere fiction, created by equity for the purposes of justice, is entirely within the control of equity; that such a relation, though a usual incident of a conveyance enforced in equity, is by no means a necessary incident of such a conveyance; that whenever, therefore, such a relation would work injustice or violate a statute, it should be disallowed; in short, that if such a relation was the only objection to specific performance

but make no disposition of either the land or its proceeds, though the land will at law descend to the testator's heir, yet the executor will in equity be entitled to have it sold, and, when sold, the purchase-money will in equity be part of the personal estate. And even though the testator, in the case supposed, devise "all his land" to A, yet A will take no more than a naked legal title to the piece of land directed to be sold. Nor is a will the only means by which an owner of property can effect an equitable conversion of it. He can also convert his land into money by a contract to sell the former, and he can convert his money into land by a contract to buy land; and if he died intestate after making such a contract, though before performance of it, his heir may, in the one case, be compelled by the executor to convey the land, though the purchase-money will go to the executor, while, in the other case, the executor may be compelled by the heir to pay for the land, though the land will be conveyed to the heir. Moreover, this equitable conversion undoubtedly takes place the moment the

of the agreement in question, the consequence was, not that specific performance should be refused, but that specific performance pure and simple should be granted, *i. e*, specific performance without any relation back. Such, it seems, should have been the decision; for as the statute prohibited any transfer of ownership in a British vessel, whether at law or in equity, except in the mode prescribed, it followed that the contract in question could not create any equitable ownership in the vessel (McCalmont *v.* Rankin, 2 De G., M. & G. 403; Coombes *v.* Mansfield, 3 Dr. 193; Liverpool Borough Bank *v.* Turner, 1 J. & H. 159, 2 De G., F. & J. 502); but if, as the court assumed, the contract created a legal right, it was no more a violation of the statute to enforce that right in equity by giving specific reparation than to enforce it at law by giving damages.

Upon the whole, it seems that the court, in dismissing the bill, did proceed upon the idea that an agreement to convey is in equity an actual conveyance; that the consequence of enforcing the agreement in question would be to make it an actual conveyance in equity from its date, and that, too, not by relation, but independently of relation; that the operation of a contract as a conveyance in equity was not a consequence of specific performance, but that the latter was a consequence of the former; that the question, therefore, which the court had to decide was not whether equitable relief should be given for the violation of a legal right, but whether the agreement could, without a violation of the statute, create an equitable right in the plaintiff, and impose an equitable obligation upon the defendant, *i. e.*, create between the plaintiff and the defendant the relation of trustee and *cestui que trust*.

It would seem to be a sufficient answer to such a view to say that, if it be well founded, a vendee of land has no occasion to file a bill for specific performance, promptly or otherwise; that he may always base his right to go into equity upon his character of *cestui que trust;* that, instead of filing a bill for specific performance, he may, *e. g.*, file a bill for an account. Indeed, a bill for an account would possess at least one signal advantage over a bill for specific performance, namely, that it would require no performance by the plaintiff, *i. e.*, that the plaintiff's right to an account would not be at all affected by the fact that he had not paid the purchase-money.

contract is made; *i. e.*, the conversion, when actually made, will relate back to the time when the contract was made. Why? Because the equitable conversion depends upon the intention of the owner of the property, as shown by his making the contract. But this, surely, has nothing to do with the relations between the vendor and the vendee, and consequently nothing to do with the question whether the ownership of the land has passed from the vendor to the vendee. It is a matter entirely between one of the contracting parties and his representatives, and in regard to which the other contracting party neither has any right, nor is subject to any duty. In a word, it is not the contract *qua* contract that effects the equitable conversion, but the contract as expressing the intention of one of the parties to it in reference to a matter within his exclusive control.

We now come to the subject of the jurisdiction of equity over legal duties which do not amount to obligations. Although any failure to perform a duty of this kind (as it is not a breach of obligation) is a tort, yet, as it consists merely in non-feasance, it is closely analogous, in respect to equity jurisdiction, to a breach of an affirmative contract or other affirmative obligation. For example, as equity cannot prevent the latter, so neither can it the former; and therefore specific reparation is the utmost relief that equity can give in respect to the former, as it is in respect to the latter. There are, however, important differences in respect to equity jurisdiction between affirmative contracts and legal duties, whether the latter amount to obligations or not. For example, all legal duties (or at least all that equity would ever attempt to enforce) are unilateral, and therefore the enforcement of them never involves any of those difficulties which are peculiar to bilateral contracts. On the other hand, legal duties generally consist only in doing, while affirmative contracts consist in giving as well; and, as the jurisdiction of equity over affirmative contracts is mostly confined to those which consist in giving, it follows that the exercise of this latter jurisdiction will seldom furnish a precedent for equity's assuming jurisdiction over legal duties. Indeed, the difficulty which equity experiences in enforcing a specific reparation which consists in doing is precisely the same, whether the thing to be repaired be the breach of an affirmative contract or of a legal duty, or be a tort which consists in mis-feasance, assuming, of course, that the latter is one which is in its nature capable of

being specifically repaired; and, therefore, the rule, as to equity's assuming jurisdiction, ought to be, and generally is, the same in all these cases. And hence it follows that, as equity will seldom enforce specific reparation of a tort which consists in mis-feasance, or of the breach of an affirmative contract which consists in doing, so it will seldom enforce a specific reparation of a breach of a legal duty. For example, an owner of a particular estate in land is subject to the legal duty of keeping the estate in repair, and a breach of that duty constitutes that species of tort called permissive waste; but as equity will not enforce specific reparation of a breach of a contract to repair, so it has been long settled that equity will not enforce specific reparation of permissive waste.[1]

It has been shown on a previous page[2] that equity might enforce specific reparation of torts which consist in mis-feasance in many cases in which it has hitherto declined to do so, and that it ought to do so whenever a specific reparation is necessary for the purposes of justice. And the same argument is applicable to breaches of affirmative contracts which consist in doing,[3] and to breaches of legal duties.

In the foregoing observations upon the jurisdiction of equity over legal duties, reference has been had to such legal duties only as are imposed by the common law. There are important legal duties imposed by the canon law; but the jurisdiction of equity over these depends upon different considerations from those hitherto presented, and the treatment of it will therefore be postponed until we come to the jurisdiction of equity over canon-law rights.

As the jurisdiction of equity over those torts which consist in non-feasance (*i. e.*, negative torts) is analogous to its jurisdiction over affirmative contracts, so the jurisdiction of equity over those contracts which consist in non-feasance (*i.e.*, negative contracts) is analogous to its jurisdiction over torts which consist in mis-feasance (*i.e.*, affirmative torts).

In respect to the mode in which equity exercises its jurisdiction over them respectively, the analogy between a negative contract and an affirmative tort is perfect. Thus, the ordinary mode of exercising equity jurisdiction over each is by granting an injunc-

[1] See Lord Castlemaine *v.* Lord Craven, 22 Vin. Abr. 523, pl. 11.

[2] *Supra*, pp. 128, 129.

[3] See Clark *v.* Glasgow Ass. Co., 1 MacQueen, 668, 670.

tion to prevent a breach of the one or a commission of the other, and it is this mode alone which measures the extent of the jurisdiction which equity will exercise over each. So if a negative contract have already been broken, or if an affirmative tort have already been committed, the only relief that equity can give (except incidentally), either for the breach of contract or for the tort, is specific reparation; and the reasons for giving or withholding that relief are the same as to each. Finally, if an injunction be granted to prevent the breach of a negative contract or the commission of an affirmative tort, equity will incidentally give relief, in the one case, for any breach of the contract already committed, and, in the other, for any tort already committed, if the case be one which admits of any relief which equity can give, *e.g.*, an account of profits; and the principle upon which equity gives such incidental relief is the same in each case, namely, that of preventing a multiplicity of suits.[1]

In respect, however, to the extent of the jurisdiction exercised by equity over them respectively by way of prevention, and the

[1] In respect to the jurisdiction of equity over breaches of contract already committed, there is no analogy between affirmative and negative contracts. In strictness there can be but one breach of an affirmative contract, as the slightest breach of such a contract is a breach of the entire contract, and puts an end to it. There can, in strictness, therefore, be no performance of any part of an affirmative contract which has once been broken. This is true even of those contracts which require the performance of a series of acts, apparently independent of each other. For example, though a contract for the purchase and sale of chattels provide for a delivery in instalments, yet a breach as to any instalment will be a breach also as to all subsequent instalments.

As an affirmative contract admits of but one breach, so it can create but one cause of action. Therefore, if an action at law be brought for a breach of an affirmative contract, damages will be given upon the whole contract, and the judgment in that action will be a bar to any future action. Hence, if equity assume jurisdiction over such a contract at all, it must assume jurisdiction over the entire contract, and give full relief. It cannot give relief as to a part of the contract, and leave the plaintiff to sue at law as to the remainder. It would be a wrong to a defendant to permit a single cause of action to be made the subject of two actions against him. Moreover, equity can never permit an action at law to be brought upon a cause of action which has been the subject of a decree in equity.

A negative contract, on the other hand, may be capable of an indefinite number of breaches, each breach constituting a separate and independent cause of action. In such a case, therefore, it does not follow, because equity has jurisdiction to prevent breaches in future, that it has jurisdiction, also, over breaches already committed.

It must be admitted that legal duties are analogous to negative contracts in respect to the number of breaches of which they are capable. Yet, as equity seldom assumes jurisdiction over legal duties, and never prevents breaches of them, it will rarely happen that the jurisdiction of equity will be affected by the fact that a legal duty is capable of an indefinite number of breaches.

reasons for which it is exercised, there is little analogy between a negative contract and an affirmative tort. If, indeed, a negative contract consist in not doing an act the doing of which equity would prevent as a tort, then equity will also prevent the doing of it as a breach of contract. For example, if a tenant covenant with his landlord not to commit waste on the demised premises, the landlord can have an injunction against the committing of waste by the tenant, either on the ground that it would be a tort, or on the ground that it would be a breach of contract. But the converse of this does not hold; for equity will frequently prevent the breach of a negative contract, though it consist in not doing an act which is not such a tort as equity will prevent, or (which is generally the fact) is not a tort at all.

Nor is there much analogy between negative and affirmative contracts, in respect either to the extent of the jurisdiction exercised by equity over them, or the reasons for its exercise. It is doubtless true that the mere fact of a contract being negative is never in itself a reason why equity should not exercise jurisdiction over it; and, therefore, cases may possibly arise in which equity will enforce a negative contract, and yet proceed independently of the fact that the contract is negative; but such cases will be very rare. And yet the jurisdiction exercised by equity over negative contracts is much more extensive than that exercised over affirmative contracts. Whenever, therefore, equity exercises jurisdiction over a negative contract, it will be found to be almost invariably true that the jurisdiction rests entirely upon the fact that the contract is negative. In what cases, then, will equity assume jurisdiction over a contract upon the single ground that it is negative? First, it seems that equity will always restrain a breach of a unilateral covenant or promise, if it be negative; for, if a covenant or promise is unilateral, it follows that the consideration for it has already been received, *i. e.*, that the covenant or promise has been fully paid for; and, as equity can restrain a breach of a negative covenant or promise without difficulty, it is not thought consistent with justice to permit a person who has given such a covenant or promise, and who has the consideration for it in his pocket, to break his covenant or promise at his pleasure, and thus to leave the covenantee or promisee to such indemnity as he can obtain by an action for damages, — a remedy which may prove worthless, after the expense of obtaining a verdict and judg-

ment has been incurred, because of the insolvency of the defendant.[1] Secondly, though a negative covenant or promise constitute one side of a bilateral contract, yet if the negative covenant or promise be not dependent upon the covenant or promise which constitutes the other side of the contract, it seems that equity will restrain a breach of the former. In such a case, as the performance of the negative covenant or promise is absolutely due to the covenantee or promisee, the effect is the same as if the negative covenant or promise were unilateral, so far as regards the question now under consideration.[2] Thirdly, though a negative covenant or promise constitute one side of a bilateral contract, and be dependent upon the covenant or promise which constitutes the other side of the contract, yet, after full performance of the latter, equity will restrain a breach of the former; for, when one side of a bilateral contract is fully performed, the other side becomes unilateral. Fourthly, though a negative covenant or promise con-

[1] "It is said that the court may execute a negative contract. I admit it. I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant on the ground that a valuable consideration had been given for it." *Per* Sir L. Shadwell, V. C., in Kimberley *v.* Jennings, 6 Sim. 340, 351. And see the observations of Lord Cottenham in Dietrichsen *v.* Cabburn, 2 Ph. 52, 57.

A common instance of a covenant which is negative and unilateral, and which, therefore, equity will enforce, is a covenant not to carry on a particular trade or business within a particular district. Williams *v.* Williams, 2 Swanst. 253, 332; Rolfe *v.* Rolfe, 15 Sim. 88; Swallow *v.* Wallingford, 12 Jur. 403; Whittaker *v.* Howe, 3 Beav. 383. And see Lumley *v.* Wagner, 1 De G., M. & G. 604, 610–611.

It seems that the defendant's agreement was unilateral in Hills *v.* Croll, 2 Ph. 60. See reporter's note, pp. 62–63. See also the report of the case in 1 Real Prop. and Conv. Cases, 541, 553. Undoubtedly the defendant would have been at liberty to purchase acids elsewhere, unless the plaintiff would supply him with acids; but that seems to have been no valid objection to granting an injunction against the defendant's purchasing acids elsewhere, provided the plaintiff would supply him. See 1 Real Prop. and Conveyancing Cases, 541, 555.

The case of Catt *v.* Tourle, L. R. 4 Ch. 654, furnishes another instance of a covenant held to be enforceable in equity, because it was negative and unilateral. There, also, the defendant would be entitled to obtain beer elsewhere, if the plaintiff did not supply him with beer of good quality and at a fair price. Hence the observation just made upon Hills *v.* Croll. in respect to the form of the injunction, is applicable also to this case.

[2] Thus in Kemble *v.* Kean, 6 Sim. 333, the defendant made an absolute and binding promise to the plaintiff, in January, 1829, not to play in London during the then current season; and it seems that that promise would have been enforced by injunction. It must be admitted, however, that such a case is not so strong as that of a purely unilateral covenant or promise.

stitute one side of a bilateral contract, and be dependent on the covenant or promise which constitutes the other side of the contract, yet, if the latter have been performed in part, and there have been as yet no breach of it, equity will restrain a breach of the former;[1] but if an injunction be granted in such a case, and afterwards there be a breach of the covenant or promise which constitutes the other side of the contract, the injunction will have to be dissolved, unless the covenant or promise which constitutes the other side of the contract be of such a nature that equity can enforce it.[2] Fifthly, if a negative covenant or promise constitute one side of a contract which is partly unilateral and partly bilateral, the negative covenant or promise will be independent of the other side of the contract, unless it be made expressly dependent; and if independent, equity will restrain a breach of it.[3] Sixthly, though the foregoing propositions are in terms limited to the case where a negative covenant or promise constitutes the whole of one side of a contract, yet it is immaterial, so far as regards the ques-

[1] Dietrichsen *v.* Cabburn, 2 Ph. 52. It seems, therefore, that the plaintiff was entitled to an injunction in Hills *v.* Croll, *supra*, though it be assumed that there was a promise on the part of the plaintiff, and even that performance by the defendant was conditional upon performance by the plaintiff. See reporter's note, pp. 62, 63–64.

For the reason stated in the text, it seems that the plaintiff was entitled to an injunction in Fothergill *v.* Rowland, L. R. 17 Eq. 132. See *infra*, p. 386, note 2.

It seems to be a fatal objection to the decision in Lumley *v.* Wagner, 1 DeG., M. & G. 604, as well as to that in Donnell *v.* Bennett, 22 Ch. D. 835, that there had been no part-performance by the plaintiff.

[2] See Stocker *v.* Wedderburn, 3 Kay & J. 393. There may be instances in which the practice stated in the text may be applied to affirmative covenants and promises, provided the latter be of such a nature that equity can enforce them. For example, in Brett *v.* E. I. & L. Shipping Co., 2 H. & M. 404, if the only breach committed by the defendants had been in omitting the plaintiff's name from their advertisements, it would seem that the court might have made a decree requiring the defendants to insert the plaintiff's name in their advertisements, leave being given to the defendants to apply to the court to be relieved from such decree, in the event of there being a breach of the contract by the plaintiff.

In Peto *v.* B. U. & T. W. Railway Co., 1 H. & M. 468, the obstacle in the plaintiff's way was that the acts which he sought to have restrained were not a breach of the defendants' contract. If there had been a covenant or promise by the defendants not to do the acts in question, it seems that the plaintiff would have been entitled to an injunction.

[3] A negative covenant in a lease is an instance of this. Barret *v.* Blagrave, 5 Ves. 555, 6 Ves. 104; Hooper *v.* Brodrick, 11 Sim. 47. In W. & W. Railway Co. *v.* L. & N. W. Railway Co., L. R. 16 Eq. 433, the defendants were in effect lessees of a line of railway, the plaintiffs being the lessors.

In Hills *v.* Croll, *supra*, if the contract was not purely unilateral, it seems that it was at least partly so, in consequence of the payment of the £200 by the plaintiff; and if so, the plaintiff was for that reason entitled to an injunction.

tion of equity jurisdiction, whether a single negative covenant or promise or several negative covenants or promises constitute one side of a contract. Seventhly, it will be no objection to enforcing a negative covenant or promise in equity that such covenant or promise constitutes only a part of one side of a contract, the remainder being affirmative, if the latter be of such a nature that equity can enforce that also;[1] or if the negative part be so separate and distinct from the affirmative part that the former ought to be performed, whether the latter be performed or not;[2] or if there have been as yet no breach of the affirmative part;[3] but if an injunction be granted on this latter ground alone, it will have to be dissolved in the event of the affirmative part being afterwards broken.[4]

Care must be taken not to assume unwarrantably that a contract contains a negative covenant or promise; for it does not follow, because a breach of a covenant or promise may consist of acts of mis-feasance, that therefore the covenant or promise is negative. Accordingly it seems that there was no negative promise in Smith *v.* Fromont;[5] and that fact alone was a sufficient ground for refus-

[1] It seems that equity had no jurisdiction over the affirmative part of the defendant's contract in W. & W. Railway Co. *v.* L. & N. W. Railway Co., *supra*.

[2] Such was in terms the nature of the negative promise in Kimberley *v.* Jennings, 6 Sim. 340; but the court held that, if such was its true construction, it was so hard a bargain that equity would not enforce it. In Rolfe *v.* Rolfe, 15 Sim. 88, it does not appear that there was an affirmative covenant by the defendant, William Rolfe, to serve the plaintiff as a cutter; but, even if there were, the negative covenant was wholly distinct from it. In W. & W. Railway Co. *v.* L. & N. W. Railway Co., *supra*, in Donnell *v.* Bennett, *supra*, in Brett *v.* E. I. & L. Shipping Co., *supra*, in Hooper *v.* Brodrick, *supra*, and in Fothergill *v.* Rowland, *supra*, it seems that the affirmative covenants covered all the ground that was covered by the negative covenants, but not that alone; that, therefore, though every breach of the negative covenant in each of those cases would be also a breach of the affirmative covenant, the converse was not true. In all such cases, it seems that equity may enforce the negative covenant, though the affirmative covenant be broken, and equity be not able to enforce that.

[3] Morris *v.* Colman, 18 Ves. 437; Dietrichsen *v.* Cabburn, *supra*.

In Kemble *v.* Kean, *supra*, and in Lumley *v.* Wagner, *supra*, the defendant's covenants were both affirmative and negative, both the affirmative and the negative parts had been broken, the court had no jurisdiction over the affirmative parts, and the affirmative and negative parts were so inseparably connected that the latter could not properly be enforced unless the former were performed. The decision, therefore, in Lumley *v.* Wagner ought, it seems, to have followed that in Kemble *v.* Kean. A consequence of the decision in the plaintiff's favor was that a part of the contract was enforced after the contract was at an end, and after a right had accrued to the plaintiff to recover full damages for its breach. Moreover, the defendant still remained liable for full damages at law, notwithstanding the decision against her in equity.

[4] See *supra*, page 385, and note 2.

[5] 2 Swanst. 330.

ing an injunction. Whether a covenant or promise is affirmative or negative does not necessarily depend, however, upon the terms in which it is expressed; for it may in truth be negative, though it contain no negative terms. For example, in Clarke *v.* Price,[1] if the true construction of the contract was, that while the defendant was not bound to report cases for publication, yet if he did do so the plaintiff was entitled to publish them on the terms specified in the contract, it would seem to follow that the defendant's promise was purely negative, *i. e.*, not to employ any other person than the plaintiff as a publisher, and not to be his own publisher; and hence that an injunction ought to have been granted.[2] The same observation is also applicable to the case of Baldwin *v.* So. for Diffusion of Useful Knowledge.[3] So, in Hills *v.* Croll, the defendant's promise would seem to have been purely negative, namely, to buy of no one but the plaintiff, and to sell to no one but the plaintiff; and, if so, the injunction clearly ought to have been granted. In Hooper *v.* Brodrick there would seem to have been an implied negative agreement not to use the house for any other business than inn-keeping, provided a license could be obtained. In W. & W. Railway Co. *v.* L. & N. W. Railway Co., though the agreement was wholly affirmative in form, it was partly negative in effect; and the same thing is true of Fothergill *v.* Rowland. Finally, in Catt *v.* Tourle, the agreement, though affirmative in form, was wholly negative in effect.

C. C. Langdell.

[1] 2 Wilson, 157.

[2] The agreement between the parties, as finally modified, was for the sale to the plaintiff of all the cases that the defendant should report, at a fixed price, namely, £ 7 for every sheet of 16 printed pages.

[3] 9 Sim. 393.

[*To be continued.*]